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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of	)	
	)	IB Docket No. 95-22
Market Entry and Regulation of	)	RM-8355
Foreign-affiliated Entities	)	RM-8392

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REPLY COMMENTS

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## TABLE OF CONTENTS

Summary . . . . .	i
I. APPLYING THE PROPOSED EFFECTIVE MARKET ACCESS TEST AS PART OF THE COMMISSION'S PUBLIC INTEREST ANALYSIS UNDER SECTION 214 OF THE ACT IS A CONSTRUCTIVE MEANS OF ACHIEVING THE COMMISSION'S REASONABLE GOALS IN THIS PROCEEDING . . . . .	1
A. The Effective Market Access Test Is a Flexible Standard . . . . .	2
B. The Effective Market Access Test Is an Appropriate Means of Promoting the Opening of Foreign Telecommunications Markets . . . . .	3
II. THE COMMISSION HAS AUTHORITY UNDER SECTION 214 OF THE ACT TO IMPLEMENT ITS PROPOSAL . . . . .	5
III. THE EFFECTIVE MARKET ACCESS TEST SHOULD BE APPLIED TO A FOREIGN CARRIER'S PRIMARY MARKETS . . . . .	9
IV. THE EFFECTIVE MARKET ACCESS TEST SHOULD APPLY TO FOREIGN CARRIER EQUITY INVESTMENTS OF GREATER THAN TEN PERCENT . . . . .	12
A. The Triggering Foreign Ownership Threshold Should Be Greater Than Ten Percent, Not Control . . . . .	12
B. The Ownership Interest of Each Foreign Carrier In a U.S. Carrier Should Be Aggregated For Purposes of Determining Whether To Apply the Effective Market Access Test . . . . .	16
C. The Commission Should Require Prior Approval of Affiliation Under Section 214 of the Act Rather Than Notification Under Section 63.11 of the Rules . . . . .	17
D. The Commission Should Not Change Its Definition of "Facilities-Based Carrier" . . . . .	17
E. The Commission Should Not Apply A Presumption of Lawfulness to Foreign Carrier Entry for Switched Resale . . . . .	19

V.	CO-MARKETING ARRANGEMENTS SHOULD BE SUBJECT TO DETAILED REPORTING REQUIREMENTS ANALOGOUS TO THOSE IMPOSED ON MCI/BT . . . . .	20
VI.	POST-ENTRY SAFEGUARDS . . . . .	21
	A. Definition of "Affiliate" Post-Entry . . . . .	21
	B. The Commission Should Prohibit International Refiling . . . . .	23
VII.	THE EFFECTIVE MARKET ACCESS TEST SHOULD ALSO BE INCORPORATED IN THE PUBLIC INTEREST ANALYSIS UNDER SECTION 310(B)(4) OF THE ACT . . . . .	23
	CONCLUSION . . . . .	25

### SUMMARY

MCI supports the Commission's proposal to employ an effective market access test in making public interest findings under Section 214 of the Act concerning foreign carrier entry into the U.S. international services market. Application of the test would achieve the Commission's goals in this proceeding and is within the Commission's statutory authority.

MCI disagrees with the claim of some parties that foreign governments would interpret the test as a "closing" of the U.S. market, that even countries with relatively open markets would have a difficult time meeting the standard, and that therefore retaliation would occur. Such concerns are not warranted.

The proposed test is flexible, and is only one component of the general public interest determination the Commission must make under Section 214. Once the Commission conducts its effective market access analysis, it will also consider other public interest factors in reviewing foreign carrier entry proposals. The Commission may allow a foreign carrier to enter the U.S. market even if it cannot demonstrate that effective market access exists, provided other factors warrant its entry. In any event, the U.S. is the largest telecommunications market in the world, and foreign carriers certainly would not be dissuaded from seeking to enter this market, as some commenters argued, by the prospect of application of the test.

Contrary to the contentions of some parties, the Commission's proposal does not intrude into the jurisdiction of the Executive Branch agencies. As NTIA, on behalf of the Executive Branch agencies, commented, subject to appropriate consultation with the Executive Branch, the Commission's use of the effective market access test is fully compatible with the Commission's statutory authority.

MCI also supports the Commission's proposal to apply the effective market access test to a foreign carrier's primary markets. MCI disagrees with the argument that the Commission should examine only the home market of the foreign carrier. Foreign carriers have the power to influence the telecommunications policies of their primary markets and those markets should be examined. Moreover, in applying the test, the Commission should prescribe a maximum period of time -- e.g., 18 months -- within which the foreign markets must be opened in order to meet the standard.

The Commission should apply the effective market access test to foreign carrier equity investments of greater than ten percent. Application of the test only to those transactions involving controlling interests, as proposed by some parties, would exempt transactions with a significant potential for abuse, and would disadvantage U.S. carriers that are competing with such foreign carriers and their affiliates.

The Commission should require prior approval of foreign carrier affiliation under Section 214 of the Act rather than after-the-fact notification under Section 63.11 of its Rules. A subsequent notification requirement is likely to render the effective market access test less effective since the Commission might be reluctant to void a foreign carrier's entry into the U.S. market.

While the Commission proposed to exclude co-marketing arrangements from its definition of "affiliation," co-marketing arrangements, particularly between the dominant U.S. carrier and dominant foreign carriers, should be subject to detailed reporting requirements analogous to the requirements placed by the Commission on the MCI/BT transaction. As other parties noted, arrangements such as AT&T's WorldPartners can have substantial anticompetitive ramifications and must be closely supervised by the Commission.

Finally, MCI agrees with other parties that the Commission should apply the effective market access test in making its public interest findings under Section 310(b)(4) for the same reason that it should use that test in the context of Section 214 -- as leverage to encourage foreign administrations to open their markets to competition by U.S. carriers.

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**REPLY COMMENTS**

MCI Telecommunications Corporation (MCI) files these Reply Comments in response to the comments filed on April 11, 1995, concerning the Commission's Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.<sup>1</sup>

**I. APPLYING THE PROPOSED EFFECTIVE MARKET ACCESS TEST AS PART OF THE COMMISSION'S PUBLIC INTEREST ANALYSIS UNDER SECTION 214 OF THE ACT IS A CONSTRUCTIVE MEANS OF ACHIEVING THE COMMISSION'S REASONABLE GOALS IN THIS PROCEEDING**

The Commission has three basic goals in this proceeding: (1) promoting effective competition in the global market for communications services; (2) preventing anticompetitive conduct in the provision of international services or facilities; and (3) encouraging foreign governments to open their communications markets. NPRM at ¶ 26. The Commission's proposed application of the effective market access test in making public interest findings under Section 214 of the Act concerning foreign carrier entry into the U.S. international services market would achieve those goals, and is within the Commission's statutory authority.

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1. FCC 95-53, released February 17, 1995.

**A. The Effective Market Access Test Is a Flexible Standard**

Some commenters argued that application of the effective market access test would backfire because foreign governments would interpret it as a "closing" of the U.S. market and would likely retaliate.<sup>2</sup> Others complained that even countries with relatively open markets would have a difficult time meeting the standard.<sup>3</sup> Neither of these concerns is warranted.

The proposed effective market access test is a flexible standard and is only one component of the general public interest determination the Commission must make pursuant to Section 214 of the Act. As the Commission explained, "[I]f there is evidence that the [foreign] market is fully competitive," not every component of the test must be met to warrant a favorable finding, and the Commission will decide on a case-by-case basis how much weight to assign each component. NPRM at ¶ 40. Moreover, once the Commission conducts its effective market access analysis, it will consider other public interest factors in reviewing foreign carrier entry proposals. NPRM at ¶ 45.<sup>4</sup>

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2. See, e.g., NYNEX Corporation at 5; Sprint at 20; Teleglobe, Inc. at 6; LDDS Communications, Inc. at 8; Deutsche Telekom AG (DT) at 32.

3. See, e.g., Teleglobe at 10; Comments of the Secretary of Communications and Transportation of Mexico at 13.

4. Those additional factors could include "the state of liberalization in the foreign carrier's domestic market and the availability of other market access opportunities to U.S. carriers; the status of the foreign carrier as a government or non-government entity; the general significance of the proposed entry to promotion of competition in global markets; the presence of cost-based accounting rates; and any national security implications." NPRM at ¶ 45.

The Commission may allow a foreign carrier to enter the U.S. market even if it cannot demonstrate that effective market access exists, provided other factors warrant its entry. Id. at ¶ 49. Thus, the Commission appropriately intends to "maintain flexibility under this approach to look at all of the public interest factors surrounding entry, and balance the market conditions of the primary markets" of foreign carriers. Id.<sup>5</sup>

In any event, the Commission essentially uses the same standard in the context of Section 310 of the Act in examining proposals by foreign carriers to invest in U.S. facilities-based carriers. For example, the Commission addressed the same concerns in its MCI/BT Order,<sup>6</sup> and it is analyzing the Sprint Petition for Declaratory Ruling regarding the proposed investment by France Telecom and Deutsche Telekom proceeding in the same light.<sup>7</sup>

**B. The Effective Market Access Test Is an Appropriate Means of Promoting the Opening of Foreign Telecommunications Markets**

The continuing strong interest of foreign carriers in entering the U.S. market indicates that the Commission should indeed be able to influence foreign governments to open their telecommunications markets. The apparent willingness of Sprint's

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5. Thus, France Telecom's (FT) concern that the Commission consider the overall public interest benefits of a transaction of which an equity investment may be one integral component, should be satisfied by this approach. See FT at 19-20.

6. 9 FCC Rcd 3960 (1994).

7. See File No. ISP-95-0002.

proposed partners, France Telecom and Deutsche Telekom, to pursue their proposed investment in Sprint notwithstanding the review the Commission is conducting of the relative openness of the French and German markets disproves Sprint's argument that the U.S. market is not "essential" and that application of the effective market access test would therefore dissuade foreign carriers from investing in U.S. carriers. See Sprint at 18.

Similarly invalid is LDDS' claim that "the best means to achieve [the Commission's] goals is not for the U.S. to restrict access to the U.S. market, but for the U.S. to lead by example by opening up its market." LDDS at 1.<sup>8</sup> Were LDDS' theory true, there would be no reason for the instant proceeding, which, as the Commission properly noted, is essential given the disadvantages confronting U.S. carriers in competing with foreign carriers. NPRM at ¶ 22. The U.S. market is highly open to foreign carriers, but such openness has not encouraged foreign administrations to open their markets.

In any event, such arguments misstate the Commission's intentions in this proceeding. The Commission is not threatening unilaterally to impose its regulatory regime on other sovereign countries, nor is it being insensitive to the internal reasons underlying their policies. Rather, the Commission is simply

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8. GTE argued in a similar vein that those countries that have not opened their markets to the degree that the U.S. has done have many reasons for not doing so, including economic, technological and political reasons, and that the "Commission must recognize that other sovereign countries have legitimate internal policies and must be permitted to develop their own communications policies." GTE Service Corporation at 3.

exercising its right -- and its duty under Section 214 of the Act -- to take into account the interests of U.S. carriers and their customers when considering the entry of foreign carriers into the U.S. international market. The Commission is simply saying that if foreign administrations want their carriers to be able to enter U.S. markets, it needs some assurance that U.S. carriers will be permitted to enter theirs so that U.S. carriers will have a reasonable opportunity to compete with foreign carriers.

Thus, the effective market access test is not a rigid checklist of requirements that foreign countries must meet, nor is it a threat to the sovereignty of foreign governments. It is, rather, a flexible framework designed to encourage mutually-beneficial arrangements among telecommunications providers worldwide. The Commission should therefore adopt its proposal.

## **II. THE COMMISSION HAS AUTHORITY UNDER SECTION 214 OF THE ACT TO IMPLEMENT ITS PROPOSAL**

In the NPRM the Commission inquired whether it has authority under Section 214 of the Act to employ its proposed effective market access test. NPRM at ¶ 38. The answer is clearly yes.

Notwithstanding arguments of several commenters to the contrary,<sup>9</sup> consideration of effective market access as an element of the Commission's public interest determinations under Section 214 is well within the Commission's jurisdiction. Notably, the Commission's fundamental mission is "to make available, so far as possible, to all the people of the United

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9. See, e.g., DT at 3-14.

States, a rapid, efficient Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."10 The Commission's goals and proposals in this proceeding are squarely in accord with that statutory mandate.

Indeed, the Commission frequently, and recently, has examined competition in foreign markets in public interest determinations under both Sections 214 and 310(b).<sup>11</sup> For example, in approving Telefonica de España's acquisition of TLD, the Commission observed that the "closed nature of foreign markets" was "a serious problem because of the potential for discrimination among U.S. carriers terminating traffic in the foreign market."<sup>12</sup> The Commission also considered competition in Chile's telecommunications market in making a Section 214 public interest finding in AmericaTel Corp, noting:

[C]onsistent with existing Commission policy, we will consider, as one factor in our public interest analysis, the degree to which Chile's

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10. 47 U.S.C. § 151.

11. A decade ago, the Commission expressed "concern[ ] about the opening of foreign markets to U.S. carriers" and indicated that it would consider conditioning foreign carrier Section 214 certificates on "reciprocal entry by additional U.S. carriers." International Competitive Carrier Policies, 102 F.C.C. 2d 812, 843 (1985). More recently, the Commission reiterated its "goal of encouraging competitive entry in foreign markets." Regulation of International Common Carrier Services, 7 FCC Rcd 7331 (1992) ("International Common Carrier").

12. Telefonica Larga Distancia de Puerto Rico and LD Acquisition Corp., 8 FCC Rcd 106, 108 (1992). The Commission also noted that unaffiliated U.S. carriers would remain vulnerable to monopoly abuse "for as long as competitive entry was not permitted." Id. at 109.

telecommunications market and regulatory regime provide U.S. firms with effective opportunities to compete. . . .<sup>13</sup>

The Commission also has examined the openness of foreign markets in making public interest determinations under Section 310(b). For example, in approving BT's recent investment in MCI, the Commission considered competition in the UK market.<sup>14</sup>

Concern with foreign market entry barriers has been a cornerstone of the Commission's dominant carrier regulation of U.S. affiliates of foreign carriers.<sup>15</sup> Moreover, in making Section 214 public interest determinations concerning international private line resale proposals, the Commission evaluates whether U.S. carriers are afforded opportunities in foreign markets equivalent to those in the United States.<sup>16</sup> Thus, not only does the Commission have jurisdiction to consider effective market access as part of its public interest determinations, but the test is consistent with established Commission policy.

Some commenters argued that the Commission's proposal is beyond its authority because it is an intrusion into the jurisdiction of the Executive Branch agencies over foreign trade

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13. 9 FCC Rcd 3993 (1994).

14. The Commission found that it was "germane to our analysis that considerable regulatory steps have been taken, and should continue to be taken, to facilitate the development of effective competition to BT." MCI/BT Order, 9 FCC Rcd at 3964.

15. See International Competitive Carrier Policies, 102 F.C.C. 2d at 842; Regulatory Policies and International Telecommunications, 4 FCC Rcd 7387, 7428 (1988).

16. See, e.g., ACC Global Corp., 9 FCC Rcd 6240 (1994).

matters. See, e.g., DT at 14-22; TLD at 5. The comments filed on behalf of the Executive Branch by the National Telecommunications and Information Administration (NTIA) disprove this argument.<sup>17</sup>

NTIA recognized the Commission's regulatory role under both Section 214 and Section 310(b)(4) of the Act with regard to foreign ownership in U.S. carriers,<sup>18</sup> and stated explicitly that the Commission has authority to implement its proposal:

[T]he Commission . . . may consider the extent to which foreign telecommunications markets are open to competition in determining the need for regulation of the international services of U.S. carriers with a foreign affiliation . . . . Subject to the requirement for deference to and coordination with the Executive Branch, the Commission may decline to grant a section 214 authority entirely or partially if this would promote the interest of the public in international telecommunications services.

NTIA at 15. Thus, NTIA clearly is not of the view that the Commission's proposal would intrude into any Executive Branch agency's area of jurisdiction as long as the Commission coordinates with the Executive Branch.

In this regard, the Commission expressly declared that it will "solicit the views of the Executive Branch on a proposed foreign carrier's entry into the U.S. market." NPRM at ¶ 45. Thus, subject to appropriate consultation with the Executive

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17. Significantly, NTIA's comments reflect the collective views of the Departments of Commerce, Defense, Justice, State and Treasury as well as the U.S. Trade Representative.

18. NTIA at iii.

Branch, the Commission's use of the effective market access test is fully compatible with the Commission's statutory authority.

### **III. THE EFFECTIVE MARKET ACCESS TEST SHOULD BE APPLIED TO A FOREIGN CARRIER'S PRIMARY MARKETS**

The Commission proposed to apply the effective market access test to the "primary markets served by the foreign carrier seeking entry." NPRM at ¶ 40. A "primary market" is defined as those "key markets where the carrier has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant market share of either the international or local termination telecommunications market of the country, and traffic flows between the United States and that country are significant." Id. at ¶ 43.

Some commenters argued that the Commission should examine only the home market and not any other primary markets. Cable & Wireless, Inc. (C&W), for example, argued that examining primary markets would "embroil" the Commission in a "multitude of complex, fact-specific inquiries each time it was presented with a foreign carrier's application" for entry. C&W at 6. See also Motorola at 3-4. In fact, however, there will not be many instances where a carrier will have a significant ownership interest in a dominant carrier in a market outside its home market that also has significant traffic flows with the United States. C&W, however, represents one of those few instances since its affiliate owns the monopoly local exchange provider in Hong Kong in addition to C&W's interests in its home market of

the United Kingdom. Since Hong Kong, with significant traffic flows with the U.S., is not an open market, it is not surprising that C&W is so adamant in its opposition of the proposal to examine primary markets.

C&W also argued that a primary market analysis will not be effective because the carrier will not likely have influence over the government of a country other than its home country. C&W at 6-7. See also Motorola, Inc. at 4; Comments of the British Government at ¶ 15. In fact, however, if the market meets the Commission's definition of "primary," meaning the carrier has significant ownership interests in a dominant carrier in that country, such as C&W has in Hong Kong, C&W takes too lightly the amount of influence that the carrier may have in that country.

DOMTEL approached the primary market proposal from another angle. It seeks to define the "substantial or dominant market share" aspect of "primary market" by requesting that the Commission not apply the effective market access test to "non-dominant foreign carriers" -- defined by DOMTEL as a carrier that controls less than a 45 percent combined market share of basic services in its home market (averaged among local exchange, domestic and international long distance). DOMTEL Communications, Inc. at 7-8. To such carriers, DOMTEL would apply streamlined procedures: a determination within six months and a rebuttable presumption in favor of Section 214 approval. Id. at 8.

MCI opposes DOMTEL's request because it would substantially weaken the effectiveness of the Commission's proposal by exempting a significant class of carriers from application of the effective market access test. First, a carrier with less than a 45 percent share of the market has the potential to influence its government's policies as well as to engage in anticompetitive conduct with regard to its U.S. affiliate. Moreover, DOMTEL's suggestion that the determination of market share should be taken from the average share among all basic services -- local exchange, domestic and international long distance -- could exclude from the test carriers that are dominant in one of the services simply because they are not dominant in all of the services. Such carriers would have the power to influence their government as well as to accord favorable treatment to their U.S. affiliates, yet would not be subject to the effective market access test.<sup>19</sup>

Accordingly, for these reasons, the Commission should apply the effective market access test to the primary markets of foreign carriers seeking entry in the U.S. market. In applying the test, the Commission should prescribe a maximum period of time -- e.g., 18 months -- within which the foreign markets must be opened as a condition to allowing the foreign carrier to enter

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19. DOMTEL also proposed that the Commission adopt a rebuttable presumption waiver for "nondominant" foreign carriers that seek to acquire up to a 60 percent ownership interest in the holding company of a radio licensee under Section 310(b)(4). MCI opposes this proposal for the same reasons it opposes DOMTEL's request for exemption with regard to Section 214.

the U.S. market.<sup>20</sup> Employing the test in this context would best advance the Commission's goal of encouraging foreign governments to open their communications markets.

**IV. THE EFFECTIVE MARKET ACCESS TEST SHOULD APPLY TO FOREIGN CARRIER EQUITY INVESTMENTS OF GREATER THAN TEN PERCENT**

**A. The Triggering Foreign Ownership Threshold Should Be Greater Than Ten Percent, Not Control**

The NPRM sought comment on the level of foreign ownership in a U.S. carrier that might "give the foreign carrier the incentive to discriminate in favor of the U.S. carrier or to engage in other strategic conduct that might have anticompetitive effects." NPRM at ¶ 57. The ownership level adopted would become the standard for "affiliation," and would trigger the application of the effective market access test.

MCI and others recommended that the Commission adopt its proposed level of greater than 10 percent foreign ownership interest as the affiliation standard.<sup>21</sup> MCI also recommended that where more than one foreign carrier has ownership interests in a U.S. carrier, those ownership interests should be aggregated, and the effective market access test applied if the collective interests exceed ten percent. MCI at 12.

Some commenters, however, argued that the effective market access test should not be applied unless a foreign carrier or

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20. See MCI at 7-8.

21. MCI at 11; BT North America, Inc. (BTNA) at 8; AT&T at 11; GTE at 8.

carriers have controlling interests in the U.S. carrier.<sup>22</sup> The Commission should not adopt this proposal. Review only of those transactions involving controlling interests would exempt transactions with a significant potential for abuse, and would disadvantage U.S. carriers that are competing with such foreign carriers and their affiliates. Instead of promoting effective competition and preventing anticompetitive behavior, this standard would encourage the very type of conduct that the Commission is trying to prevent.<sup>23</sup>

France Telecom and Deutsche Telekom argued for use of a "control" standard. FT stated, "It is principally in a situation where a non-U.S. carrier controls a U.S. service provider that such carrier's incentives to discriminate might outweigh the public interest benefits of making capital and technology from outside the United States available to U.S. companies." FT at 4. Both point to the Commission's International Common Carrier proceeding, with FT contending that the Commission there concluded that "absent a controlling interest in a U.S. carrier, a non-U.S. carrier would be unable to direct the actions of the

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22. See, e.g., FT at 4; NYNEX at 6; AmericaTel Corporation at 13; Sprint at 7.

23. Communication Telesystems International (CTS) argued that "the Commission should exempt small U.S. international carriers from this barrier to foreign investments." CTS at 2. CTS defines "small" as "carriers with gross annual revenues from international services of less than \$125 million and control of no U.S. bottleneck facilities." Id. MCI opposes this request. Exemption of any class of U.S. carriers would increase the opportunity for foreign carriers to engage in anticompetitive behavior by using the U.S. carrier, irrespective of its size, as the vehicle for the provision of international services.

U.S. service provider and the U.S. provider would be unwilling to risk sanctions by the Commission for discriminatory conduct that violated its rules, policy or any conditions of its Section 214 certificates." FT at 5 (citing International Common Carrier, 7 FCC Rcd at 7332). See also DT at 51-53.

First, International Common Carrier dealt only with post-entry regulation of foreign-affiliated U.S. carriers, not with pre-entry authorization. As explained infra, MCI agrees that control is the standard that should be used to determine affiliation for post-entry regulation purposes. See infra at 21-23. As MCI also explains, however, the reason for determining affiliation for entry purposes is different than for post-entry regulation purposes.

In International Common Carrier the goal was to prevent anticompetitive activity. But MCI agrees with DT that the definition of affiliation should be determined by reference to the Commission's objectives in this proceeding. See DT at 53. In this proceeding prevention of anticompetitive behavior is only one of the goals. But another goal in this proceeding is to encourage foreign governments to open their communications markets. As shown above, a threshold lower than control is necessary to accomplish this goal.<sup>24</sup>

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24. FT complained that the test would "apply equally to a purchase of a non-controlling 30% interest in a U.S. service provider as to a purchase of 51 % or 100%" FT at 7. This is not entirely accurate. Because the test will be applied flexibly, even though it will be applied to investments greater than 10 percent, the more investment involved, the greater the scrutiny will be.

Sprint argued that in the case of minority investments "[w]here the benefits to the foreign carrier of its investment are less, the foreign administration is less likely to be coerced into opening its markets." Sprint at 26. However, this is not necessarily true since even less-than-controlling interests in U.S. carriers can be substantial. In any event, the same argument could be made to oppose any standard adopted by the Commission. For instance, if a foreign government is less likely to be interested in a 45 percent controlling interest than in a 65 percent interest, then why not make the threshold 65 percent? Obviously, such reasoning should not govern the Commission's choice of a threshold.

TLD argued that the standard should not be tied to ownership level at all. Rather, TLD would have the Commission "consider the size [i.e., dollar amount] of the foreign carrier's investment in the U.S. carrier and the volume of traffic the FAC [foreign affiliated carrier] has between the United States and the home market," which, according to TLD, are "more important factors in considering the incentives for competitive abuse" than even a controlling interest. TLD at 73.

The motive behind TLD's argument is clear. TLD is 79 percent foreign-owned and its parent has a significant interest in the Peruvian telephone company, and therefore it is not surprising that TLD is a fierce opponent of the Commission's proposals in this proceeding. See TLD at 67. Moreover, TLD offers no support for its self-serving assertion that incentive

for abuse is created not by the percentage of foreign ownership, but rather by "the volume of traffic sent to affiliated countries." The threshold of greater than 10 percent foreign ownership is an entirely reasonable affiliation standard and the Commission should adopt it.

**B. The Ownership Interest of Each Foreign Carrier In a U.S. Carrier Should Be Aggregated For Purposes of Determining Whether To Apply the Effective Market Access Test**

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MCI and others took the position that where more than one carrier has ownership interests in a U.S. carrier, those ownership interests should be aggregated, and the effective market access test applied if the collective interests exceed ten percent. MCI at 12. While MCI recommended that in such cases only those foreign carriers whose interests exceed 5 percent should be examined,<sup>25</sup> AT&T suggested that all foreign carriers having interests should be examined. AT&T at 27.

FT opposed the aggregation of investments of two or more foreign carriers for determining whether the threshold for application of the effective market access test has been crossed. FT explained that the Commission and investors would have difficulty dealing with a case in which the relevant home markets were at different stages of openness. FT at 10.

MCI believes that its proposal to apply the effective market access test when the aggregate interests exceed 10 percent, but only to those carriers whose interests exceed 5 percent,

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25. MCI at 12. See also Motorola at 11-12.

maintains the proper balance between the incentive to open foreign markets and the burden of applying the test to every foreign carrier regardless how minute the interest.

**C. The Commission Should Require Prior Approval of Affiliation Under Section 214 of the Act Rather Than Notification Under Section 63.11 of the Rules**

The Commission proposed to amend Section 63.11 of its Rules to require notification within 30 days rather than 90 days of an "affiliation" between U.S. and foreign carriers. If, after reviewing the facts surrounding the transaction the Commission believed that they warranted further review, it would designate the carrier's Section 214 certificates for hearing. NPRM at ¶ 51.

MCI agrees with other commenters, however, that an "after-the-fact" notification requirement rather than a prior approval requirement is likely to render the effective market access test less effective since the Commission might be reticent to take the drastic step of undoing a "done deal." See, e.g., BTNA at 11-12; AT&T at 29. MCI believes that if a transaction involves foreign carrier(s) ownership acquisition greater than the threshold adopted in this proceeding for application of the effective market access test, then that transaction should be subject to prior approval by the Commission.

**D. The Commission Should Not Change Its Definition of "Facilities-Based Carrier"**

The NPRM proposed to codify the Commission's current definition of "facilities-based carrier." NPRM at ¶¶ 67-71. In

response, IDB Communications, Inc., merely reiterated its position that a carrier should be regulated as facilities-based when it acquires the maximum interest in the underlying cable or satellite facility permitted by law. CTS took IDB's proposal a step further, arguing that small carriers ought to be permitted "to elect to lease rather than buy capacity if that flexibility better served [the] individual carrier's business plans and capital requirements." CTS at 7-8.

The Commission should adhere to its proposal not to change the current definition of "facilities-based." As the Commission explained in the NPRM, IDB's proposal would allow carriers to interconnect foreign-leased circuits with the U.S. public switched network without demonstrating that the foreign country provides equivalent resale opportunities to U.S. carriers, thereby violating the International Resale Order.<sup>26</sup> This would impair the Commission's goals in this proceeding as it would provide no incentive for foreign administrations to open their markets to facilities-based competition, and would further aggravate current settlement deficits. IDB has not demonstrated otherwise and thus the Commission should retain its current definition.

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26. NPRM at ¶ 71 (citing Regulation of International Accounting Rates, 7 FCC Rcd 559 (1991)).

**E. The Commission Should Not Apply A Presumption of Lawfulness to Foreign Carrier Entry for Switched Resale**

The Commission proposed to apply a rebuttable presumption that no competitive harm would result from permitting unlimited foreign carrier entry into the U.S. market for switched resale, even to affiliated countries. NPRM at ¶ 74. MCI showed in its Comments that no such presumption is justified because such foreign carriers do have substantial capacity to engage in anticompetitive conduct. Therefore such carriers should have the conventional burden of demonstrating under Section 214 that their entry into the U.S. market is in the public interest, without the benefit of a presumption of lawfulness. See MCI at 18-19.

AT&T and GTE agree that unrestricted entry of foreign-owned resellers has substantial anticompetitive potential. AT&T explained that "resale entry permits a foreign carrier with a closed home market to provide services to customers on both ends of an international route, which the Commission has recognized confers an unfair advantage on the foreign carrier," and provides no incentive for foreign administrations to open their markets.<sup>27</sup> GTE is in agreement with MCI that a foreign carrier reseller has substantial opportunity to engage in predatory tactics by acting in concert with its U.S. affiliate. See MCI at 19, GTE at 6.

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27. AT&T at 23, 24. See also TLD at 30-31 (As long as the Commission allows entry on a resale basis, denial of entry on a facilities-based basis "is unlikely to provide any significant independent pressure on a foreign carrier or its home government to change their positions on telecommunications restructuring in the home country.").